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Office of Administrative Law Judges
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Date: November 14, 2000

Case No.: 2000-LHC-1466

OWCP No.: 07-153372

In the Matter of

ROBERT D. ROBERTS

Claimant

v.

INGALLS SHIPBUILDING, INC.

Employer

APPEARANCES:

W. Harvey Barton

For the Claimant

Paul B. Howell

For the Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et

seq., brought by Robert D. Roberts (Claimant) against Ingalls Shipbuilding, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing on September 29, 2000. However, prior to the scheduled hearing the parties reached agreement on all issues except the extent of Claimant's disability, the applicability of the Second Injury Fund (Section 8(f)) and Claimant's attorney's fee. A Joint Stipulation of Fact and Law was submitted with a Request for Entry of Order. This decision is based upon a full consideration of the entire record.[1]

Although the Regional Solicitor was served with the Joint Stipulation and Section 8(f) Petition, no response thereto has been filed. Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

The parties stipulated (JX-1), and I find:

1. That the Claimant was at all times pertinent hereto subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA), since he was employed as an electrical foreman in the construction of naval vessels at Ingalls Shipyard which adjoins the navigable waters of the Pascagoula River and the Gulf of Mexico.

2. That Claimant's injury occurred during the course and scope of his employment with Employer on or about January 17, 1999, when he suffered a major depressive disorder related to his employment, causing mental and emotional injuries.

3. That Claimant's average weekly wage at the time of the injury was $1,287.29.

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[1] References to the transcript and exhibits are as follows: Employer Exhibits: EX-___; and Joint Exhibit: JX-__ .

4. That the Claimant reached maximum medical improvement on the date of injury or January 17, 1999.

5. That the Claimant asserts he is totally disabled and the Employer asserts Claimant has no disability due to his injury. A job market survey performed on Claimant substantiates the parties' compromise agreement that Claimant has a minimum wage earning capacity of $206.00 per week since his injury.

6. That Claimant suffered from a manifest pre-existing disability (arteriosclerosis resulting in a questionable stroke and quadruple heart bypass) which materially and substantially combined and contributed to his injury of January 17, 1999, to cause his permanent partial disability.

7. That Employer is entitled to Second Injury Fund relief effective 104 weeks from January 17, 1999.

8. That no penalties or interest are due.

9. That Employer is entitled to a credit for all non-occupational disability and/or salary continuation benefits paid as a result of this occupational injury in the amount of $35,903.22 (as of September 1, 2000).

10. That Employer is responsible for Claimant's future authorized, reasonable and necessary psychiatric/psychological treatment causally related to the injury of January 17, 1999, pursuant to § 7 of the Act.

11. That Counsel for Claimant shall be entitled to a reasonable and necessary attorney's fee, pursuant to § 28 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. The extent of Claimant's disability;

2. Employer's entitlement to Section 8(f) relief; and

3. Entitlement to Attorney's fees.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant was deposed by the parties on February 23, 2000. Claimant began working for Employer in 1967 as a nuclear test engineer. (EX-24, p. 8). After six months at that position Claimant was moved to another engineering slot, and ultimately promoted to a supervisory capacity. (EX-24, pp. 8-9). Claimant worked at Employer in a supervisory capacity until 1973 when he left Ingalls to serve as vice-president of a floor covering distributor.

Claimant returned to Employer in 1975 in a managerial capacity, and after six months was promoted to general ship superintendent, a position he retained until he had a cardiac infarction. (EX-24, pp. 13-14). Claimant testified he was off work for one week and was transferred to the staff of Ingalls Vice-President of Operations in a non-managerial capacity. (EX-24, p. 26). Four months later Claimant returned to management as a general ship superintendent for four months, at which time Claimant had completed his most recent assignment and was reassigned to his last staff position. (EX-24, pp. 29-30).

Six to eight months later Claimant was reassigned to a managerial role as a general electrical superintendent. (EX-24, p. 32). In this capacity Claimant was trying to iron out production difficulties that were behind and over budget. Claimant admitted that while operating in this capacity he had some difficulties with other supervisors. (EX-24, pp. 32-35).

After approximately one year in his capacity as general electrical superintendent, Claimant was transferred to waterfront shipbuilding in a similar supervisory capacity, during which time he received a pay increase. (EX-24, pp. 36-37). Shortly thereafter Claimant was reduced to superintendent, a move that was explained to him as being a “general required cutback.” Claimant testified “it just – just threw me for a loop. I couldn’t take it.” (EX-24, p. 37). After this Claimant was cut to foreman and put on second shift. (EX-24, p. 38). Claimant testified this was “a tremendous shame, with all the things I had accomplished at Ingalls.” (EX-24, p. 39).

After a few months in this capacity, Claimant took on a

temporary position as an electrical engineer doing field work on ships under construction. (EX-24, p. 41). It was during this period Claimant experienced a second cardiac event. (EX-24, p. 45). A heart catheterization was performed at Singing River Hospital by Dr. Kandola that led to a quadruple bypass operation. (EX-24, pp. 45-47).

When Claimant eventually returned to Ingalls after his recovery, he was employed as an electrical superintendent, but he was subsequently demoted to foreman, something he "had a hard time handling." (EX-24, p. 50). Claimant testified that this demotion was irrational and "undeserved." (EX-24, p. 51). At this point, Claimant started to experience anxiety for which he was prescribed medication. Claimant testified he began avoiding people and became withdrawn. Claimant also asked to be relieved of his responsibilities at church as President of the Men's Club and as a Sunday School teacher. (EX-24, pp. 52-53).

Claimant was referred by his minister to Dr. Hull, a psychologist. Claimant testified that after he began treatment with Dr. Hull he started to have suicidal thoughts. Claimant testified he was "so ashamed to have dropped down so far" as he did at Ingalls. (EX-24, p. 55). Claimant testified that he was eventually hospitalized by Dr. Smith for these suicidal thoughts. (EX-24, p. 58). Claimant believed he was a failure at work and that people there disliked him. Dr. Smith told Claimant not to go back to work. Thereafter, Claimant's general practitioner retired and he became a patient of Dr. Roth, who also indicated he should not return to work. (EX-24, pp. 60-61). Claimant's last day of work at Ingalls was January 17, 1999. He has not held any employment since that time.

Claimant was hospitalized a second time for depression at St. Dominic's Hospital that involved counseling and group therapy sessions. Claimant checked himself out of this treatment facility because it was not "doing anything for me and the counselor and I had a problem." (EX-24, pp. 69-70.)

Claimant testified he was referred to Dr. Kinney at the University of Alabama-Birmingham Hospital where they performed ECT (shock treatment). (EX-24, p. 71). Claimant testified that this helped and he is considering further treatments on an "as needed basis."

Claimant testified that he is "still living with depression" but that he is doing better. Claimant indicated he still

experiences memory loss, difficulty sleeping, a diminished appetite, shaking (as the result of his medication) and a general desire to avoid people. (EX-24, pp. 66-68).

Claimant does not feel that he has recovered sufficiently to return to work. Claimant stated, "nothing would make me happier than to go back into ships management, but I couldn't do it in my present condition." (EX-24, p. 72). Claimant indicated he could not do ship superintendent work, superintendent work or foreman work. (EX-24, pp. 73-74). When asked why he could not work as a general ship superintendent, Claimant answered that he could not sweep the floors in the warehouse, "because people would be running past me and making a mess and that would irritate me and upset me." (EX-24, p. 85).

Medical Evidence

Dr. Terry J. Millette

On November 13, 1992, Claimant experienced what Dr. Millette opined was a transient ischemic attack or warning stroke. After subsequent testing, including an MRI and CT scan of the brain which were normal, Claimant was cleared to return to work on January 8, 1993. (EX-16, p. 1).

Dr. Louie C. Wilson

Claimant was admitted to Providence Hospital on September 9, 1995, for complaints of severe left chest pain, acute left arm weakness and facial numbness. (EX-16, p. 8). At that time Claimant was diagnosed with ischemic heart disease secondary to triple vessel coronary disease. On September 12, 1995, a coronary artery by-pass was performed on Claimant. (EX-16, p. 10).

Dr. Jaswinder S. Kandola

Claimant followed up on his coronary bypass surgery with Dr. Kandola at Singing River Hospital in Pascagoula, Mississippi. At Claimant's first appointment on October 25, 1995, he complained of right sided pain post-operatively resulting in several trips to the emergency room. Dr. Kandola found that

Claimant's surgical wounds were healing, although some tenderness remained. Dr. Kandola believed Claimant's pain was musculoskeletal or neuralgiac in origin. (EX-16, p. 17).

After a positive thallium stress test, Claimant had a heart catheterization and angioplasty performed on December 19, 1995, at the behest of Dr. Kandola. Claimant was diagnosed as having a "significant lesion in the distal circumflex" for which he underwent the aforementioned procedures. (EX-16, pp. 23-24).

Claimant followed up periodically with Dr. Kandola. (EX-16, pp. 25-40). At these appointments Claimant had recurrent complaints of fatigue and shortness of breath, in addition to voicing concerns about having a heart ailment. Claimant was instructed to continue treatment with Dr. Baumhauer, in addition to his follow-ups with Dr. Kandola.

Claimant had a second cardiac thallium stress test performed on November 18, 1996, at the request of Dr. Kandola. This test showed no evidence of ischemia. (EX-16, p. 41). Claimant was subsequently admitted to the emergency room on December 17, 1996, complaining of chest pain radiating down his left side and shortness of breath. (EX-16, p. 42). A heart catheterization was performed that was read by Dr. Kandola as "essentially clear." (EX-16, p. 45).

Claimant continued to visit the emergency room with complaints of chest pain through February 1998. (EX-16, pp. 48-53). In consultation with Dr. Roth, Dr. Kandola indicated that an evaluation of Claimant's upper GI tract was in order. (EX-16, pp. 55-56).

Claimant presented at the emergency room again on September 16, 1998, complaining of chest pains. (EX-16, p. 61). Dr. Kandola opined that Claimant's pain was not the result of obstructive coronary artery disease, but that this "has caused havoc in this gentleman's life. He is always worried about something going wrong with his heart and the patient himself request (sic) aggressive further evaluation." (EX-16, p. 65).

Subsequently, Dr. Kandola performed a third heart catheterization on Claimant, which resulted in no change in Dr. Kandola's recommended treatment of Claimant. (EX-16, pp. 67-70).

Dr. Kandola opined that the most likely cause of Claimant's

heart trouble was a hardening of the arteries, unrelated to his work for Employer, but that his cardiac problems have combined and contributed to his depressive disorder, thereby rendering Claimant "materially and substantially more disabled than probably he would have been from either condition standing alone." (EX-16, p. 70).

Dr. Emile Baumhauer

The medical records of Dr. Baumhauer reveal that Claimant has treated with Dr. Baumhauer since at least February 23, 1995 for various symptoms and conditions. (EX-17). On September 7, 1995, a normal ultrasonographic examination and echocardiogram were conducted at Singing River Hospital at the request of Dr. Baumhauer. (EX-17, pp. 6, 8). Claimant continued treating with Dr. Baumhauer at least through April 17, 2000. (EX-17, p. 38).

Dr. Randy C. Roth

Claimant was first seen by Dr. Roth on January 26, 1998. Claimant presented with "a myriad of complaints," among which were difficulty swallowing solid foods, a history of coronary disease, and elevated liver function. (EX-18, p. 7). In addition to these physical ailments, Claimant admitted to being depressed. Claimant's chart indicated a past medical history of hyperlipidemia, coronary artery disease, depression and anxiety. Previously Claimant indicated he had a triple bypass in 1996, a tonsillectomy and a hernia repair. Dr. Roth prescribed "massive risk factor modification" for Claimant's heart disease, an upper GI to rule out a peptic ulcer or esophageal stricture, liver function tests and a psychiatric evaluation. (EX-18, p .8). Claimant was referred to Dr. William Smith.

Claimant's upper GI showed a normal esophagus without any obstruction, and a small hiatal hernia with minimal reflux. (EX-18, p. 26).

Claimant was seen again by Dr. Roth on February 16, 1998, when he presented at the emergency room complaining of chest pains. (EX-18, p. 30-31). Dr. Roth admitted Claimant and referred him to Dr. Kandola. Dr. Kandola diagnosed Claimant's pain as non-cardiac. Dr. Orleans performed an upper endoscopy which showed "evidence of gastritis, arthritis and perhaps early esophagitis and Barrett esophagus." Claimant was prescribed medications and discharged on February 18, 1998. (EX-18, p.

33).

Claimant presented at the emergency room again on July 30, 1998, with chest discomfort. (EX-18, p. 37). Claimant indicted he developed blurred vision, cramping in his chest and left arm numbness while at work. Claimant's residual symptoms decreased while he was in the hospital and he was directed to see Dr. Roth in the next week for follow-up.

Claimant saw Dr. Roth on August 3, 1998, for follow-up and stated that he had been under stress at home and at work and that his anxiety level was heightened. (EX-18, p. 39). Claimant informed Dr. Roth on the day of his most recent emergency room visit he had a presentation at work, "that probably took him over the edge." Claimant was instructed to follow-up with Dr. William Smith for an adjustment of his anti-anxiety medication.

Dr. Roth was consulted on September 2, 1998, by Dr. William Smith. Dr. Smith had diagnosed Claimant as having suicidal ideation and admitted him to the psychiatric department for evaluation. (EX-18, p. 41).

Claimant saw Dr. Roth again on September 16, 1998, at which time he complained of having pain in the center of his chest for two days. (EX-18, p. 43). Claimant was ordered to undergo a heart catheterization the next day because "from a psychiatric perspective . . . this will give this guy some piece of mind." Id.

Claimant was not treated again by Dr. Roth until he injured his shoulder while cleaning his pool on January 14, 1999. (EX-18, p. 56).

Dr. Roth informed Employer via letter dated March 4, 1999, that Claimant was fully medically disabled, and that in his opinion Claimant's mental and physical health was being compromised by his job. (EX-18, p. 59). In a second letter to Ingalls date March 18, 1999, Dr. Roth went into more detail regarding Claimant's disability. (EX-18, p. 62). Dr. Roth indicated that Claimant's prior vein grafts, performed during his heart bypass operation, were working successfully, but that the severity of his coronary artery disease was "limiting this gentleman's health." Dr. Roth opined that Claimant's illness is exacerbated by stress brought about by his position with Ingalls and that he should be totally disabled because of his coronary

artery disease made worse by his "severe incapacitating major depressive disorder."

On May 3, 1999, Dr. Roth referred Claimant to Dr. Cleve Kenney for ECT treatment. (EX-18, pp. 63, 68). Claimant subsequently underwent 8 ECTs over 12 days. At his next appointment June 21, 1999, Claimant appeared to Dr. Roth to be "the best I have seen him from a mental prospective." On June 9, 2000, Dr. Roth opined, based upon a reasonable medical probability, that Claimant's pre-existing cardiac illness combined with and contributed to his major depressive disorder to render Claimant materially and substantially more disabled than he would have been as a result of his depressive disorder alone. (EX-18, p. 69).

Dr. William Smith

Four to five months prior to being admitted to the hospital for suicidal tendencies, Claimant had begun seeing Dr. Smith, a psychiatrist, for a major depressive disorder. (EX-19, pp. 1-2). Claimant was diagnosed as having a depressed mood, diminished energy, anhedonia, extreme anxiety, social isolation, and withdrawal. At the time of his hospital admission on September 1, 1998, Claimant was diagnosed as having been "severely suicidal." Claimant alleged he had moved a weapon to his wood shop and contemplated buying ammunition with which to kill himself. Claimant reported one serious stressor is his relations with his superiors at his place of employment and his perception that his services are no longer necessary. Claimant stayed in the hospital for four days under suicidal observation until he was discharged on September 4, 1998. (EX-19, p. 3). At the time of his discharge Dr. Smith obtained Claimant's assurance that he would not harm himself and that they would follow up with weekly office visits.

Claimant was admitted to the hospital for depression a second time on February 26, 1999. (EX-19. pp. 10-12). Claimant was again diagnosed as being suicidal. Dr. Smith indicated that Claimant's depression had worsened after he advised Claimant to stop working and apply for medical disability. Claimant was diagnosed as having paranoid projections whereby when he looks into someone's eyes "they are looking through him" and that he was useless and unworthy. Dr. Smith believed that his depression had progressed to the point of having a "psychotic overtone." On the first night of this hospital stay, Claimant

was witnessed by staff putting a belt around his neck in an attempt to harm himself. (EX-19, p. 13).

In a letter dated March 8, 1999, to Employer, Dr. Smith opined that in his medical opinion Claimant was totally disabled. Dr. Smith then listed the following medical conditions as his basis:

> that Mr. Roberts suffers from a Major Depressive Disorder, Recurrent; and with an intercurrent disabling anxiety disorder. This is largely exacerbated by stress and more particularly, stress he experiences in the daily routine of his work at Ingalls Shipbuilding . . . he has incapacitating cardiac difficulties which are severely worsened by his emotional state."

(EX-19, p. 15).

In a second letter dated June 6, 2000, Dr. Smith opined that, based upon a reasonable medical probability, Claimant's pre- existing cardiac problems would combine with and contribute to his major depressive disorder to render him materially and substantially more disabled than he would have been as a result of the major depressive disorder alone. (EX-19, p. 18).

St. Dominic's Jackson Memorial Hospital

Claimant was admitted to St. Dominic's Hospital in Jackson, Mississippi on April 5, 1999, based on a referral from Dr. Smith. Claimant presented with muscle tremors, poor concentration, memory loss, delusions, paranoia, tearful, recent suicidal thoughts, lack of appetite and difficulty sleeping. (EX-20, p. 13). At one point, Claimant indicated that he saw dancing masked men dressed in khaki suits that "know all my thoughts and can see right through me." (EX-20, p. 20). Electroconvulsive therapy (ECT) was discussed and later declined by Claimant. After several days in the hospital, Claimant attested to feeling better and denied being suicidal or homicidal and was subsequently released on April 8, 1999. (EX-20, pp. 64-66).

Dr. Cleve Kinney, University of Alabama at Birmingham Medical

Center

Claimant presented to Dr. Kinney on May 24, 1999, with recurrent major depression and dependent personality disorder with avoidant features. (EX-21, p. 6). Claimant was referred to Dr. Kinney for possible ECT treatment by Drs. Roth and Smith. (EX-21, p. 9).

Subsequently, eight ECT sessions were performed on Claimant. After this treatment Claimant's mood was much improved and his affect was described as "bright." At his discharge, Claimant had ceased to have suicidal or homicidal ideation. (EX-21, p. 10).

Dr. John W. Davis

On July 18, 2000, Claimant was seen Dr. Davis, a board-certified psychologist at the request of Employer. Dr. Davis administered a battery of tests from which he opined Claimant had a major depressive disorder, recurrent, controlled by medication. (EX-22, p. 13). Dr. Davis doubted that Claimant could return to work in his previous supervisory capacity, but that Claimant "could probably work in some capacity as an individual contributor, out of supervision, with an understanding supervisor." Dr. Davis believed that maximum medical improvement had been reached and while his present condition could be maintained with medication, there was also the possibility of recurrence. Dr. Davis also opined that Claimant's pre-existing cardiac condition did contribute to his psychological problems and rendered him more disabled than he would have been from the psychological problems alone. (EX-22, p. 14).

Vocational Rehabilitation Report, Tommy Sanders, C.R.C.

At the request of Employer, a job assessment and hypothetical labor market survey was performed on Claimant. Based on Dr. Davis' opinion that Claimant could work individually versus as part of a team, Claimant was deemed qualified for entry level unskilled to semi-skilled jobs. Positions included were night watchman ($6.00 per hour), drawbridge gate tender ($1034.00 per month) and fuel booth cashier ($5.35 per hour). (EX-23, p. 2). The night watchman job was for Professional Security at William Carey College in Gulfport, Mississippi working 30-40 hours per week and riding

throughout campus in a golfcart checking to ensure all doors are locked. The gate tender position was for the Mississippi Department of Transportation and involved 40 hours of work weekly with duties to open and close drawbridges for boat traffic. Coastal Energy was accepting applications for fuel booth cashiers to work in booths independently accepting payment for petroleum purchases, but who also complete shift reports, sweep, mop and clean restrooms once per shift. It was noted that these jobs would not expose Claimant to the stress factors he previously experienced with Employer.

A follow-up hypothetical labor market survey was conducted in September 2000, in which a security guard position with Pinkerton's Security in Pascagoula, Mississippi paying $5.90 per hour and newspaper carrier jobs paying $600 - $800 monthly were identified. The security guard job involved making six rounds per shift and punching time keys. Newspaper carriers picked up and delivered papers to customers.

The Contentions of the Parties

Claimant contends that he is totally disabled as the result of the major depressive disorder he experienced in the course and scope of his employment with Ingalls. (JX-1)

Employer argues that Claimant has no disability as the result of his major depressive disorder. However, Employer argues that in the event Claimant is found permanently disabled, that he suffered from a pre-existing disability, arteriosclerosis, which resulted in a questionable stroke and a quadruple heart bypass. Employer contends that these pre-existing conditions materially and substantially combined with and contributed to Claimant's major depressive disorder suffered on January 17, 1999, thereby resulting in Claimant's permanent partial disability being greater than that which would have been brought about by his major depressive disorder alone. Consequently, Employer contends that their liability should be limited to 104 weeks from the date they claim Claimant reached maximum medical improvement, January 17, 1999. Id.

The Regional Solicitor of the U.S. Department of Labor failed to submit a brief on the applicability of Section 8(f) in this matter.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Based on the medical evidence submitted and Claimant's deposition testimony, I find that Claimant has established a prima facie case that he suffered an "injury" under the Act, having established that he suffered a major depressive disorder on or about January 17, 1999, and that his working conditions and activities on that date could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that the Claimant's condition was not caused or aggravated by his employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v.

Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared

with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Based on the stipulations of the parties, and the totality of the evidence presented, I find that Claimant suffered a major depressive disorder which is related to his employment with Employer. In view of the medical opinions of record, Claimant cannot return to his former supervisorial position because of the job-related stress. Thus, he has established that he is totally disabled. Based on the parties' stipulation, I find Claimant reached maximum medical improvement on January 17, 1999.

C. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038

(5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F. 2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F. 2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F. 2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Based on the hypothetical job market survey performed for Employer, I find that Employer has met its burden of demonstrating the availability of suitable alternative employment that Claimant could perform subsequent to experiencing his major depressive disorder.

Of the suitable alternative jobs identified by Mr. Sanders for Claimant, an average of the earnings reveals a weekly wage earning capacity of $221.41 ($6.00 x 40 hrs/wk = $240; $6.00 x

30 hrs/wk = $180; $1034.00 ÷ 4 wks = $258.50; $5.35 x 40 hrs/wk = $214; $5.90 x 40 hrs/wk = $236; $800 ÷ 4 wks = $200). I further find that Claimant is **permanently partially disabled,** based upon the Joint Stipulations of the parties which indicate he has a minimum wage earning capacity of $206.00 since the date of his work-related illness (January 17, 1999).

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F. 2d at 1042-1043; P & M Crane, 930 F. 2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F. 2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F. 2d 1003 (5th Cir. 1978).

Here, I find Claimant has failed to make any showing that he tried to obtain alternative employment.

Accordingly, Claimant is entitled to the payment of permanent partial disability benefits from January 17, 1999 to present, and continuing thereafter based on a weekly wage earning capacity of $221.41 per week.

D. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers [an] injury . . . of permanent partial disability . . . , found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.
>
> (2) (A) After cessation of the payments . . . the

> employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . .

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f) Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 835 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, such as here, an additional requirement must be shown, i.e., that Claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. § 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the

employer. Maryland Shipbuilding and Drydock Co. v. Director, OWCP, U.S. DOL, 618 F2d. 1082 (4th Cir. 1980); Director OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Claimant's pre-existing condition and manifestation to Employer

Claimant's first cardiac event occurred while he was employed with Ingalls on November 13, 1992. Prior to driving himself to the emergency room where he was diagnosed as having had a "warning stroke," Claimant was seated at his desk at Ingalls preparing to attend a production meeting. Claimant contacted his immediate supervisor prior to leaving for the hospital and was subsequently visited by this supervisor in his hospital room. Claimant's second cardiac event also took place while he was at work for Employer on September 9, 1995. This event required that he be transported via ambulance to the hospital after he lost control of his vehicle. This event was witnessed by an Ingalls employee who also called an ambulance for Claimant's transportation.

Claimant was diagnosed with triple vessel coronary disease and underwent coronary artery by-pass surgery. Subsequently, Claimant suffered recurring chest pains and multiple emergency room visits. He underwent three catherization procedures which revealed "essentially clear" vessels.

Although Dr. Kandola opined that Claimant's heart trouble was a result of hardening of the arteries, not related to his

work for Employer, his depressive disorder was connected to his worry over his cardiac condition and job-related stress.

Based on these facts, I find that the record supports the conclusion that Claimant suffered from a pre-existing disability. In addition, the fact that both major flare ups of his pre-existing condition occurred while Claimant was at work, clearly indicates that his pre-existing condition was manifest to Ingalls.

2. Claimants pre-existing disability contributed to a greater degree of disability

Dr. Kandola, Claimant's cardiologist opined that his cardiac condition combined with and contributed to his depressive disorder. Dr. Roth opined that Claimant's mental and physical health was being compromised and exacerbated by his job with Employer.

Dr. Kandola, Dr. Roth (Claimant's general practitioner), Dr. Smith and Dr. Davis (Claimant's most recent psychologist) all opined that Claimant's pre-existing cardiac condition combined with and contributed to his major depressive disorder and thereby rendered him more disabled than he would have been from his depressive disorder alone.

Based upon this overwhelming and uncontradicted medical evidence, I find that Claimant's prior cardiac illness combined with and contributed to making his major depressive disorder materially and substantially worse than it would have been from his current illness alone. I further find that Claimant's pre-existing disability posed the very sort of increased compensation risks that would motivate an Employer to discharge him or to refuse to hire him.

Accordingly, I find and conclude that Employer has established the pre-requisites for Section 8(f) relief which is hereby **GRANTED**.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for permanent partial disability from January 17, 1999, and continuing based on the difference between Claimant's average weekly wage of

$1287.29 and his reduced weekly earning capacity of $221.41 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

2. Employer remains responsible and shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's January 17, 1999, work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer's request for Section 8(f) relief is hereby **GRANTED**.

4. After the cessation of payments by Employer, continuing benefits shall be paid pursuant to Section 8(f) of the Act from the Special Fund established in Section 44 of the Act until further notice.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 14th day of November, 2000, at Metairie, Louisiana.

_____
LEE J. ROMERO, JR.
Administrative Law Judge